IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 3RD APRIL 2007 / 13TH CHAITHRA 1930

SA.No. 360 of 1993()

AS.288/1989 of DISTRICT COURT, THALASSERY
OS.130/1984 of MUNSIF COURT, KUTHUPARAMBA

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APPELLANT: RESPONDENT /DEFENDANT

K.V.MAMMU, SOCIAL WORKER, CHAVASSERI AMSOM,
ULIYIL DESOM.

BY ADV. SRI.V.GIRI.
P.R.VENKATESAN
K.A.ABDUL HAMEED &
MEERA SIDHARDHAN

RESPONDENTS:APPELLANTS/PLAINTIFFS
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1. PILATTATTIATH PUTHIYAPURAYIL KUNHIBI,
RESIDING AT KALLAI AMSOM, AZHEEKKAL DESOM.
2. -do- NADIRA, RESIDING AT DO. DO. DO
3. -DO- FERSANA, RESIDING AT DO. DO. DO.
4. -DO- FAIZ, RESIDING AT DO. DO. DO.
5. -do- FERVIZ (MINOR) REPRESENTED THROUGH NEXT FRIEND
THE FIRST RESPONDENT, RESIDING AT DO. DO.

BY ADV. SRI.U.K.RAMAKRISHNAN-R1 TO R5.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 03/04/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

ORDER ON C.M.P.NO.848/1993 IN S.A.NO.360/1993

3.4.07 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.360 OF 1993 A

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Dated this the 3rd day of April, 2007

JUDGMENT

Defendant in O.S.130/1984 on the file of Munsiff Court, Kuthuparamba is the appellant. Respondents are the plaintiffs. Respondents instituted the suit seeking a decree for permanent prohibitory injunction. According to respondents, plaint schedule property originally belonged to Arinhalikaruvantavida tarwad(A.K. Tarwad) and in O.S.1/1964 tarwad properties were divided and Ext.A1 final decree was passed on 16.4.1989. Under the final decree the properties included in share No.16 were allotted to A.K.Moosakutty, the 10th defendant in that suit and plaint schedule property was item No.105 of the said suit. On the death of Moosakutty on 13.6.1983 his rights devolved on first respondent widow and respondents 2 to 5 children. The property allotted to Moosakutty under Ext.A2 share list was taken delivery in

execution of the decree on 11.11.1983 and thus respondents obtained possession of the property. Appellant has no manner of right, title or possession over the property. It was contended that during pendency of the suit while receiver was managing the properties, receiver used to auction usufructs in respect of the properties in his possession and appellant used to participate in the auction and was successful bidder of item No.105 and 87 properties for a number of years and he is not entitled to trespass into the property and therefore a decree for permanent prohibitory injunction has to be granted. Subsequently after appellant filed his written statement, respondents got the plaint amended by paying court fee as provided under section 27(a) of Kerala Court Fees and Suit Valuation Act contending that as the defendant disputed the question of title, title is also to be decided. Appellant filed a written statement contending that A.K. tarwad has no right over the property and the jenmom right belonged to

Keezhooridam tarwad and the property has been in the possession of his grandmother as a tenant and thereafter appellant has been in possession of his property paying rent and obtaining receipt and while so he purchased jenmom right from the Iritty Land Tribunal and also obtained purchase certificate and respondents have no title or possession of the property. It was also contended that in the final decree proceedings, Moosakutty had filed Ext.B1 application (I.A.303/1975) stating that the plaint schedule property was purchased by the appellant from the Land Tribunal and therefore he may be allotted some other property and it shows that respondents are not in possession of the property and hence respondents are not entitled to the decree sought for.

2. Learned Munsiff framed the necessary issues. On the side of respondents, three witnesses were examined and on the side of appellant, three witnesses were examined. Exts.A1 to A27, and Exts.X1 to X34 were marked on the side of

respondents and Exts.B1 to B19 were marked on the side of the appellant. Learned Munsiff on the evidence found that respondents did not establish their title or possession to the property and therefore they are not entitled to the decree sought for. The suit was dismissed. Respondents challenged the decree and judgment before District Court, Thalasserry in A.S.288/1989. Learned Additional District Judge analysed and reappreciated the evidence. On the evidence, it was found that plaint schedule property is item No.105 of Ext.A1 final decree which was allotted to Moosakutty under Ext.A2 share list. Learned District Judge also found that though the title originally set up in the plaint was the jenmom right, during the progress of the suit after producing Ext.A15 marupattam evidencing the lease in favour of A.K. Tarwad the suit was proceeded on the basis that title is the leasehold right and appellant understood the case and was not prejudiced by the change of the case and evidence

establish that A.K. Tarwad had leasehold right over the property and including the plaint schedule properties of Tarwad were divided under Ext.A1 final decree in O.S.1/1964 and plaint schedule property was allotted to 10th defendant Moosakutty and on his death his rights devolved on respondents. Learned District Judge further found that the lease in favour of his grandmother set up by appellant was not established and the evidence do not establish the tenancy right claimed and evidence establish that while receiver was functioning plaint schedule property was taken on melpattam by the appellant and therefore he has no tenancy right. In the light of these findings, learned District Judge held that respondents established their possessory title under the leasehold right. Learned District Judge on the evidence found that the property has been taken delivery under Ext.A4 delivery receipt and respondents have established their possession and therefore in reversal of the findings of the trial

court, allowed the appeal and granted a decree for injunction restraining appellant from interfering with their peaceful possession of the property. This Second Appeal is filed challenging the decree and judgment passed by the learned District Judge.

3. Second Appeal was admitted formulating the following substantial questions of law.

a) When the suit is on title and plaintiffs claim title to the property as absolute owners, was the first appellate court justified in referring to evidence which are contrary to the pleadings.

b) In a suit where there was no prayer for declaration of possessory title, was the court justified in entering a finding regarding the possessory title.

c) In the absence of any evidence to show any mistake apparent on

the face of the record or any fraud or collusion, is not the certificate of purchase issued by the Land Tribunal binding and conclusive against all.

d) Will the delivery kychit in a case binds strangers to the suit and proceedings.

e) In the nature and circumstances of the case, was the first appellate court justified in finding possessory title with the plaintiff and grant injunction in their favour.

4. Learned Senior counsel appearing for appellant and learned counsel appearing for respondents were heard.

5. Learned Senior counsel appearing for appellant challenged the decree and judgment passed by first appellate court contending that the title set up in the plaint was the jenmom right and what

was upheld by the first appellate court was the possessory title based on Ext.A15 marupattam and without pleading that case should not have been even considered by the first appellate court and therefore the finding on title is unsustainable. It was also argued that there is no evidence to prove that Ext.A15 marupattam was acted upon or A.K.tarwad was paying any rent to the jenmi or possessing the plaint schedule property as a lessee and therefore the title upheld by the first appellate court is not sustainable. It was also argued that the property covered under Ext.A15, if it is taken as per the measurement shown therein, could only be less than 55 cents and the plaint schedule property is one acre 81 cents and Ext.A15 is insufficient to uphold the leasehold right in respect of the plaint schedule property. Learned Senior counsel then argued that though respondents claimed right title and possession under Ext.A4 delivery receipt, appellant was not a party to the said suit or the proceedings and the delivery

receipt is not binding on appellant and though PW2 the amin was examined his evidence is insufficient to prove actual delivery of the property, as according to PW2, the copy of the preliminary decree was not available with him at the time of effecting delivery and the boundaries of the property could be seen only from the preliminary decree and he had given delivery of the property shown by the plaintiffs and therefore there is no evidence to prove that actual delivery was taken pursuant to Ext.A4. It was also argued that the finding of the first appellate court that K.V. Mammu shown in the records relating to the auction proceedings conducted by the receiver appointed in O.S.1/1964 do not relate to the appellant as there are other person by name K.V. Mammu and there is no acceptable evidence to prove that the signature of Mammu who participated in the auction proceedings, was that of the appellant. It was further argued that though PW3 was examined and he claimed to be the kariasthan of the receiver, his

evidence is insufficient to prove the records or the identity of K.V. Mammu and the first appellate court should not have relied on his evidence to hold that appellant had participated in the auction or bid the right to take usufructs auctioned by the receiver and on that basis first appellate court should not have disbelieved the case of the appellant or accepted the case of the respondents. Finally it was argued that under section 72K of the Kerala Land Reforms Act, the purchase certificate is a conclusive title and in Ext.B1 affidavit filed before the court by Moosakutty requesting the court to change item No.105 allotted to him by the Commissioner stating that appellant has purchased the jenmom right of the said property from the Land Tribunal and Ext.B17 order or Ext.B15 purchase certificate were not challenged, first appellate court should not have granted the decree ignoring Ext.B15 purchase certificate. It was also argued that Ext.B1 would amount to a judicial admission made by the 10th defendant in O.S.1/1964 which is

binding on the respondents, his legal heirs and in such circumstance, the decree and judgment are to be set aside.

6. Learned counsel appearing for respondents argued that first appellate court has elaborately considered each and every piece of evidence and found that plaint schedule property is item No.105 of Ext.A1 final decree and Advocate receiver appointed by the court was managing the properties and the right to take usufructs was annually being auctioned by the receiver and appellant himself has participated in the auction and had bid the right to collect usufructs from item No.105 property and therefore appellant is not entitled to contend that plaint schedule property was outstanding in the possession of his grandmother as a lessee under Keezhooridam tarwad or subsequent to the grandmother it was in the possession of the appellant. It was also argued that evidence of the appellant as DW1 establish that he himself admitted that plaint schedule property is item

No.105 of Ext.A1 final decree and that item was allotted to Moosakutty, the 10th defendant in that suit and learned District Judge on appreciating the evidence rightly found that plaint schedule property was allotted to the share of Moosakutty and under Ext.A4 the property was taken delivery by the respondents and has been in their possession. It was argued that though appellant contended that the property was in the possession of his grandmother as a lessee, there was no evidence to substantiate the lease and though Ext.B7 receipt was produced evidencing the payment of rent to the landlord, on appreciating Ext.B7, it was disbelieved by first appellate court and there is no reason to interfere with that appreciation of evidence. It was also argued that first appellate court being the fact finding authority appreciated the evidence of PW2 and PW3 extensively and found their evidence credible and reliable and upheld the case of respondents and there is no reason to interfere with that findings.

It was also argued that after PW3 was recalled Ext.A17 to A23 were marked which establish that PW3 was functioning as Kariasthan of the receiver and as the receiver was died before he could be examined PW3 was examined and evidence of PW3 establish that plaint schedule property was in the possession of the receiver. It was pointed out that evidence of PW3 establish that appellant was known to him from childhood and he is also residing nearby and the plaint schedule property was taken auction from the receiver by the appellant and there is no reason to interfere with the said evidence.

7. True, the title set up in the plaint was the jenmom right belonging to A.K. tarwad. But it is clear that the title so set up is the title of Moosakutty under Ext.A1 final decree and allotted to Moosakutty under Ext.A2 share list and taken delivery under Ext.A4. The suit is only for injunction and no declaration of title was sought. Respondents had sought a decision on the question

of title, after paying court fee as provided under section 27(a) of Kerala Court Fees and Suit Valuation Act since defendants disputed the title. In such circumstance, what is to be decided is whether respondents have title to the plaint schedule property. If respondents have title under Ext.A1 final decree, which was allotted to Mammu under Ext.A10 and it has been taken possession by them under Ext.A4 and establish their possession of the property, I find no reason to interfere with the decree granted by the first appellate court. The question is whether that fact is established.

8. Though Senior counsel relying on Ext.A15 argued that the property obtained under Ext.A15 is less than 55 cents when the plaint schedule property is one acre 81 cents and it is not proved that the property is the same, in the nature of the case, I do not find it necessary to go into that aspect. What was claimed by respondents was that plaint schedule property was obtained under Ext.A1 final decree by their predecessor. It is the title

set up in the plaint. The question is whether plaint schedule property is item No.105 of Ext.A1 final decree which was allotted to the 10th defendant under Ext.A2 share list. The description of the property is the same. Moreover, appellant himself admitted at the time of his examination as DW1 that it is the very same property. Therefore the finding of the first appellate court that the plaint schedule property is item No.105 of Ext.A1 final decree which was allotted to Moosakutty under Ext.A2 is perfectly correct and warrants no interference. The title of respondents is thus proved.

9.Then the question is whether the receiver was in possession of the property as contended by respondents and disputed by the appellant. The receiver died earlier and was not available to be examined at the time of recording the evidence. Instead PW3 was examined. Though the fact that PW3 was the Kariasthan of the receiver was challenged at the time of evidence, after examination of PW3

was over he was again recalled and examined and Exts.A17 to A23 records were produced which include a postcard written by the official Advocate receiver to the appellant in respect of the properties in the possession of the receiver. In the light of Ext.A17 to A23, first appellate court rightly accepted the evidence of PW3 that he was the Kariasthan of the receiver.

10. Then the question is whether there is evidence to prove that plaint schedule property was in the possession of the receiver and the right to collect the usufructs was being auctioned. The evidence of PW3 establish that he was not only the Kariasthan of the receiver but was residing near to the house of the appellant and to the plaint schedule property. Therefore evidence of PW3 with regard to the identity of K.V.Mammu who auctioned the right to collect the usufructs evidenced by the records produced and relied on by the first appellate court, cannot be doubted. The evidence of PW3 establish the identity of appellant K.V.

Mammu who acutioned the right evidenced by the records maintained by the receiver. Records produced from the custody of the receiver establish that the accounts of the receiver were being audited by a Chartered Accountant. Even immediately after the relevant entries relating to the right bid by the appellant, the signature of the auditor is seen establishing its genuiness. Therefore on appreciating the evidence, I find no reason to differ with the findings of the court below that K.V. Mammu referred to in the records is the appellant himself. To satisfy my conscience, I had compared the signature seen in the records with the signature seen in the deposition of DW1 and I find no reason to doubt the identity. The evidence therefore establish that appellant himself was participating in the auction and had bid the right to collect the usufructs from the receiver. The receiver was appointed in 1964 and was continuing till the final decree was passed. In such circumstance, the finding of first appellate

court that the respondent established their possession of the property warrants no interference.

11. Though first appellate court has upheld the title of respondents qualifying it as possessory title on the strength of Ext.A15 marupattam, the evidence is insufficient to support that finding. Ext.A15 is a unilateral document executed by Karuvante Valappil Kunhammayan in favour of Keezhooridam the jenmi. There is nothing in Ext.A15 to prove that marupattam was accepted by the jenmi. No counter part executed by the landlord was produced to prove that Ext.A15 was accepted by the jenmi. No evidence was also adduced to establish that Karuvante Valappil Kunhammayan or his successor paid rent pursuant to Ext.A15 marupattam. In such circumstances, the finding of learned Additional District Judge that respondents have established the title under Ext.A5 is unsustainable. But as the respondents have established their predecessor Moosankutty obtained

the property under Ext.A1 final decree and obtained possession under Ext.A4 delivery receipt and they are in possession of the property, respondents are entitled to the decree for permanent prohibitory injunction.

The Second Appeal is allowed in part. The decree granted by first appellate court confirmed subject to the modification that the finding on possessory title under Ext.A15 is vacated.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.360 /1993

JUDGMENT

3RD APRIL, 2007